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Abdul Samid bin Edward v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–210–08 OF 2012
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND VARGHESE GEORGE JJCA
21 JANUARY 2015

C

Criminal Law — Defence — Sudden fight or self defence — Mere bare statements from appellant — Whether there was evidence or corroboration tendered

D

Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — Appellant stabbing deceased with knife — Direct evidence of eye witnesses corroborating each other — Whether plea of self-defence established — Evidence pointing to irresistible conclusion that appellant inflicted fatal wound on deceased — Whether maximum evaluation of evidence carried out — Whether defence raised fully considered — Whether absence of motive would exculpate appellant

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Evidence — Circumstantial evidence — Evidence to irresistibly point to guilt of accused

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The appellant was charged under s 302 of the Penal Code for the offence of having murdered one Budi bin Sohidee ('the deceased'). The appellant denied attacking or stabbing the deceased and raised the defence of 'self defence'. The learned trial judge ('judge') accepted the testimony of PW1 and PW2 as direct evidence of eye witnesses to the incident and which corroborated each other as to material aspects on the presence and involvement of the appellant in the incident. The judge held that the appellant had failed to cast any doubt on the prosecution's case nor had he established his plea of self defence on the evidence produced. The judge acknowledged that the actual weapon (knife) was not positively identified (although the appellant led the investigators to recover a knife from his house) and that neither PW1 nor PW2 saw the appellant armed with a weapon or inflicting the injury in question. Nevertheless the judge held that based on the primary facts that had been proved, the evidence all pointed to one irresistible conclusion, namely that it was the appellant that had inflicted the fatal wound to the neck of the deceased. The appellant was found guilty as charged and was sentenced to death by hanging. The appellant appealed against that decision on the grounds that: (a) no maximum evaluation of the

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evidence was done by the judge at the close of the prosecution's case; (b) the judge had failed to fully consider the defence raised by the appellant; and (c) the court had failed to properly appreciate the testimony of PW8, which it was asserted, corroborated the appellant's own defence.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The judge did not commit any error at the close of the prosecution's case in relying on circumstantial evidence to hold that a prima facie case had been made out and it was the appellant who had inflicted the injury to the neck of the deceased which in turn had resulted in the death of the deceased. The judge had directed himself correctly on the law of circumstantial evidence for the basis of his ruling (see para 24).

(2) When circumstantial evidence is the basis of the prosecution's case, the evidence proved must irresistibly point to one and only one conclusion, namely the guilt of the accused. The question to be answered was whether the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. On the records there was no other hypothesis suggested or put to the prosecution's witnesses and neither was there any gap in the prosecution's evidence implicating the appellant directly to the incident where the deceased suffered the fatal chop wound. It was also not suggested at all to any of the prosecution's witnesses that the deceased was armed with a weapon (see paras 25 & 27).

(3) There was the direct evidence of PW1 and PW2 (who was a few metres away from the deceased at the bus stop) that the appellant had suddenly appeared at the scene and executed a strangle-hold on the deceased neck from the back of the deceased. There was no other person in the immediate proximity to the deceased save for the appellant when the deceased shouted out that he had been stabbed. When withdrawing from the scene of the crime, the appellant was also seen to cover his hand with a blood-soaked towel and further the appellant's shirt was splattered with blood. The appellant did not return to his house but was apprehended elsewhere and subsequently brought home the next day by the police. If the appellant had nothing to do with the event at the crime scene, one would expect him to return to his house (see paras 28–29).

(4) Although motive is an important element to look out for when relying on circumstantial evidence to convict an accused, it is not an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge preferred against him, notwithstanding all other evidence which points to the accused being guilty of the crime charged (see para 32).

(5) As for the defences of sudden fight or self defence, they were bare statements from the appellant. There was no shred of evidence or any corroboration as to such alleged incident even remotely (see para 36).

(6) As for the argument that the judge was wrong in holding that there was no defensive wound suffered by the accused when on the records, PW8 (a police officer), had testified otherwise, it was incumbent upon defence to have pursued to obtain such relevant medical evidence and to have it adduced in court to establish that the wounds suffered by the appellant were indeed in the nature of 'defensive wound'. This had not been done despite such avenue being open and within the powers of the defence to do so at the trial (see paras 39 & 41).

[Bahasa Malaysia summary

Perayu telah dituduh di bawah s 302 Kanun Keseksaan untuk kesalahan membunuh Budi bin Sohidee ('si mati'). Perayu menafikan telah menyerang atau menikan si mati dan menimbulkan pembelaan 'self defence'. Hakim perbicaraan yang bijaksana ('hakim') telah menerima keterangan PW1 dan PW2 sebagai keterangan langsung saksi-saksi utama kepada kejadian itu dan yang menyokong satu sama lain berhubung aspek-aspek penting berhubung kehadiran dan penglibatan perayu dalam kejadian itu. Hakim telah memutuskan bahawa perayu telah gagal menimbulkan apa-apa keraguan berhubung kes pendakwaan mahu pun dia telah membuktikan pli mempertahankan diri berdasarkan keterangan yang dikemukakan. Hakim memperakui bahawa senjata yang sebenar (pisau) tidak dikenal pasti secara positif (walaupun perayu membawa para penyiasat untuk mendapatkan semula pisau dari rumahnya) dan bahawa PW1 mahu pun PW2 melihat perayu bersenjata atau melakukan kecederaan yang dipersoalkan. Walau bagaimanapun, hakim telah memutuskan bahawa berdasarkan fakta-fakta utama yang telah dibuktikan, keterangan kesemuanya menunjuk kepada satu kesimpulan tidak boleh ditolak, iaitu bahawa ia adalah perayu yang telah menyebabkan luka yang membawa maut itu kepada leher si mati. Perayu telah didapati bersalah seperti dituduh dan dijatuhkan hukuman gantung sampai mati. Perayu telah merayu terhadap keputusan tersebut atas alasan bahawa: (a) tiada penilaian maksimum terhadap keterangan yang telah dilakukan oleh hakim pada penutup kes pendakwaan; (b) hakim telah gagal mengambil kira sepenuhnya pembelaan yang ditimbulkan oleh perayu; dan (c) mahkamah telah gagal memahami sewajarnya keterangan PW8, yang mana ia menegaskan, menyokong pembelaan perayu sendiri.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim tidak melakukan apa-apa kekhilafan pada penutup kes pendakwaan dalam bergantung kepada keterangan mengikut keadaan untuk memutuskan bahawa satu kes prima facie telah dibuktikan dan ia adalah perayu yang melakukan kecederaan kepada leher si mati yang

seterusnya telah menyebabkan kematian si mati. Hakim telah mengarah dirinya dengan sewajarnya berhubung undang-undang tentang keterangan mengikut keadaan untuk asas keputusan beliau (lihat perenggan 24).

(2) Apabila keterangan mengikut keadaan adalah asas kes pendakwaan, keterangan yang telah dibuktikan hendaklah menunjukkan dengan nyata kepada satu dan hanya satu kesimpulan, iaitu kesalahan tertuduh. Persoalan untuk dijawab adalah sama ada kesan kumulatif untuk semua keterangan membawa kepada kesimpulan yang nyata bahawa ia adalah tertuduh yang melakukan jenayah itu. Berdasarkan rekod tiada hipotesis lain yang dicadangkan atau diutarakan kepada saksi-saksi pendakwaan dan tidak terdapat apa-apa jurang dalam keterangan pendakwaan yang mengaitkan perayu secara langsung dengan kejadian di mana si mati mengalami luka dalam yang membawa maut. Ia juga tidak dicadangkan langsung kepada mana-mana saksi pendakwaan yang si mati bersenjata (lihat perenggan 25 & 27).

(3) Terdapat keterangan langsung PW1 dan PW2 (yang berada beberapa meter daripada si mati di perhentian bas) bahawa perayu tiba-tiba muncul di tempat kejadian dan mencekik leher si mati dari belakang si mati. Tiada orang lain yang berada dekat si mati kecuali perayu apabila si mati menjerit yang dia telah ditikam. Semasa beredar daripada tempat kejadian jenayah itu, perayu juga dilihat tangannya dibalut dengan tuala yang berlumuran darah dan kemeja perayu juga terdapat percikan darah. Perayu tidak pulang ke rumahnya tetapi telah ditahan di tempat lain dan kemudiannya di bawa pulang keesokan harinya oleh polis. Jika perayu tidak ada apa-apa kaitan dengan kejadian itu di tempat kejadian jenayah itu, seseorang itu akan menjangkakan dia akan pulang ke rumahnya (lihat perenggan 28–29).

(4) Walaupun motif adalah elemen penting untuk dibuktikan apabila bergantung kepada keterangan mengikut keadaan bagi mensabitkan tertuduh, ia bukan suatu yang mutlak, di mana, ketiadaan 'motif' yang dibuktikan akan melepaskan tertuduh daripada pertuduhan yang dibuat terhadapnya, meskipun semua keterangan lain menunjukkan tertuduh bersalah kerana jenayah yang dituduh itu (lihat perenggan 32).

(5) Berhubung pembelaan untuk pergaduhan tiba-tiba atau membela diri, ia kenyataan semata-semata daripada perayu. Tiada bukti langsung atau apa-apa yang menyokong kejadian tersebut yang dikatakan itu walaupun sedikit (lihat perenggan 36).

(6) Berhubung hujah bahawa hakim terkhilaf dalam memutuskan bahawa tiada kecederaan defensif yang dialami oleh tertuduh walhal atas rekod, PW8 (seorang pegawai polis), telah memberi keterangan sebaliknya, ia adalah wajib ke atas pembelaan untuk meneruskan bagi memperoleh

keterangan perubatan yang relevan dan agar ia dikemukakan di mahkamah untuk membuktikan kecederaan yang dialami oleh perayu sememangnya bersifat 'defensive wound'. Ini tidak dilakukan meskipun terdapat ruang yang terbuka dan dalam kuasa pembelaan untuk berbuat demikian semasa perbicaraan (lihat perenggan 39 & 41).]

Notes

For cases on defence in general, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 997–1001.

For cases on s 302, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1899–2031.

For cases on circumstantial evidence in general, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 1062–1137.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Karam Singh v PP [1967] 2 MLJ 25, FC (refd)
PP v Haniff Basree bin Abdul Rahim [2004] 3 MLJ 271, HC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A
Penal Code s 302

Appeal from: Criminal Case No T-45–1 of 2010 (High Court, Tawau)

Hamid Ismail (Hamid & Co) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] On 3 August 2012 the High Court at Tawau had found the appellant guilty as charged and sentenced him to death by hanging.

The charge brought against the appellant was:

Bahawa kamu pada 11hb Oktober 2008 jam lebih kurang 11 malam bertempat di sebuah pondok menunggu bas di Kampung Kurnia Jaya, Batu 4, Jalan Apas, di dalam Daerah Tawau di dalam Negeri Sabah dengan sengaja telah menyebabkan

A kematian kepada seseorang BUDI BIN SOHIDEE L/25 THN, BUGIS M/Kad 821116-12-6069. Oleh itu kamu telah melakukan kesalahan di bawah Seksyen 302 Kanun Keseksaan.

B **[2]** At the close of the prosecution's case, the learned trial judge having accorded, as it is stated in the judgment, maximum evaluation to the evidence adduce by eight witnesses and having been satisfied that all the ingredients of the offence under s 302 of the Penal Code had been established ruled that a prima facie case (s 180 of the Criminal Procedure Code) had been made out against the appellant.

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[3] The appellant opted to give evidence on oath and called his wife ('DW2') as the only other defence witness. The appellant denied attacking or stabbing the deceased and raised the defence of 'self defence'.

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[4] At the end of the trial, the learned judge held that the appellant had failed to cast any doubt on the prosecution's case nor had he established his plea of self defence on the evidence produced.

E **[5]** Before us counsel for the appellant advanced three broad grounds in appeal why the finding of guilt by the High Court should be reversed and the sentence set aside. They were that:

(a) there was no maximum evaluation of the evidence by the learned judge F at the close of the prosecution's case;

(b) the learned judge had failed to fully consider the defence raised by the appellant at the trial; and

(c) the court had failed to properly appreciate the testimony of PW8, which G it was asserted, corroborated the appellant's own defence.

[6] We heard counsel for the appellant and the learned deputy public prosecutor on 9 September 2014 and we were unanimous that the learned judge had not committed any error in holding that on the evidence the H appellant was guilty as charged.

We now set out the grounds for our decision.

THE PROSECUTION'S CASE

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[7] There were three crucial witnesses. 'PW1' was the uncle of the deceased whilst 'PW2' was the deceased's brother. The other was 'PW3', the pathologist who conducted the post-mortem on the body of the deceased.

According to PW1 and PW2 there was a wedding reception on 11 October 2008 at the village (Kg Kurnia Jaya).

[8] PW1 had come to know that a fight had broken out between one Abu Kassim and another Johan. He had gone initially to the wedding house to locate his nephew and subsequently to a bus stop located about 50 metres from his house in order to advise his nephew and PW2 to return home.

[9] At the bus stop PW1 had intervened in a fight between Kassim and the deceased and had successfully got the parties to stop any further skirmish.

[10] According to PW1, as the matter was calming down, the appellant (known to PW1 as Omar Salleh) suddenly appeared at the bus stop and rushed at the deceased and locked the deceased's neck with his hands in a strangle-hold.

PW1 did not see the appellant holding any weapon but the deceased had shouted out to him — 'Pak Usu saya kena tikam'. By then the deceased was bleeding from his neck and asked to be sent to the hospital. The appellant had by then just walked away from the scene.

[11] The following excerpts from the testimony of PW1, particularly under cross-examination, are pertinent to be noted.

> Si Omar keluar daripada jambatan pertama terus ke pondok di belakang Si Budi dan terus mencekik dan belakang.
>
> ...
>
> Ketika saya menyabarkan Si Abu Kassim saya ternampak Si Omar Salleh keluar dan terus ke belakang saya dan kebelakang Si Budi.
>
> ...
>
> Semasa kejadian Si Budi sedang membuang air kecil datang Si Omar Salleh kebelakangnya mencekik dari belakang dan menolak Budi. Selepas itu Si Omar Salleh pun berjalan ke sebelah jalan dan saya mendengar Si Budi berteriak 'Pak Su, saya ditikam'. Selepas itu saya nampak Si Omar Salleh membungkus tangan dengan tuala yang berlumuran dengan darah dan bajunya yang berlumuran dengan darah.

[12] PW2's testimony included the following statement:

> Mula-mula saya menyabar Si Kada dan Abu Kasim. Tiba-tiba Omar Salleh lalu di belakang saya terus menuju ke arah Budi dari arah belakang. Selepas itu dia menolak Budi dan dia membungkus tangannya dengan tuala dan dia pun berjalan ke sebelah jalan. Selepas itu berteriak adik saya dia telah dicederakan. Kami naik bas dan ke hospital.

[13] When questioned by the court PW2 further stated that it was the right hand of the appellant that was wrapped with the towel.

[14] The pathologist, PW3 testified that there was a 'chop incised wound' measuring about 14cm long on the right side of the deceased's neck inflicted in a downward manner. It was her conclusion that the cause of death was hypervolaemic shock caused by bleeding as a result of the said wound at the right front of the neck which had cut the sternocleidomastid muscle, the right traverse process of the fifth cervical vertebra and the underlying vertebral artery. In her opinion that injury was fatal.

ASSESSMENT AT THE CLOSE OF THE PROSECUTION'S CASE

[15] The learned judge accepted the testimony of PW1 and PW2 as direct evidence of eye witnesses to the incident and which corroborated each other as to material aspects on the presence and involvement of the appellant in the incident at the bus stop. After assessing the evidence adduced overall the learned judge concluded that a prima facie case had been established as all the ingredients necessary to constitute the offence of murder under s 302 had been satisfied. The deceased had been identified by PW2. The appellant was known to these two witnesses.

[16] The court held, as borne out by the evidence of PW3, that the deceased's death was caused by the fatal injury inflicted to the neck of the deceased.

[17] On the issue of whether the deceased's death was caused by or in consequences of the acts of the appellant, the learned judge was of the view that this had to be determined based on the totality of the evidence led before the court. In this respect, the testimony of PW1 and PW2 (eye witnesses) showed that the appellant was the 'only person to have physical contact with the deceased immediately before (the deceased) suffered the fatal injury'. The fact that the appellant's right hand was seen to be wrapped in a towel covered with blood further supported the conclusion that it was the appellant who had inflicted the chop injury on the deceased.

[18] The learned judge acknowledged that the actual weapon (knife) was not positively identified (although the appellant led the investigators to recover a knife from his house) and that neither PW1 nor PW2 saw the appellant armed with a weapon or inflicting the injury in question. Nevertheless the learned judge held that based on the primary facts that had been proved, the evidence all pointed to one irresistible conclusion, namely that it was the appellant that had inflicted the fatal wound to the neck of the deceased.

[19] As regards the issue whether in inflicting the single 'chop incised wound'. the appellant had the intention to cause death or to cause such bodily injury as he knew to be likely to cause death or which in the ordinary course of nature was sufficient to cause death, the learned judge in his grounds of decision noted as follows:

> In the instant case, the intention of the accused is to be determined or inferred from the facts surrounding the event. It is my finding that a person who had cut a person's neck as what the OKI did to the deceased must be said to understand or reasonably know that the effect of such an act would be to cause the other person's death. It is also evident from PW3's evidence that the cut injured the deceased's vital organ, namely his vertebral artery. Cumulatively, these facts would lead to an inference that OKT intended to cause the death of the deceased.

THE DEFENCE

[20] The appellant denied inflicting the wound or injury suffered by the deceased. According to him he had gone to the bus stop to pick up a friend as requested by his wife (DW2). Many people were gathered there and there was some shouting going on.

[21] All of a sudden the deceased, the appellant claimed, had attacked him with a sharp object and had stabbed him on his left arm. He was then involved in a scuffle with the deceased and grabbed the deceased from the back. It was during this commotion that the deceased had shouted that he was injured. The appellant then went away from the scene.

[22] The line of defence taken by the appellant at the High Court stage was that he was acting in 'self defence' when attacked by the deceased; he had himself suffered injuries to his arm as a result of the struggle with the deceased.

JUDGMENT OF COURT AT CONCLUSION OF TRIAL

[23] The salient pronouncements of the court were recorded as follows:

> I rule that on a balance of probabilities the accused has failed to cast doubts on the prosecution's case. I further rule that the accused failed to establish his plea of self defence and did in fact caused the fatal injury on the neck of the deceased.
>
> ...
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> ...
>
> I find that the prosecution have proved beyond reasonable doubt the charge against the Accused person Abdul Samid bin Edward @ Omar bin Salleh under s 302 Penal Code for the murder of one Budi bin Sohide ....

A BEFORE US AND OUR DECISION

[24] The first ground of appeal canvassed before us was that the prosecution's evidence had not been subjected to maximum evaluation by the learned judge as required, before the defence was called. It was argued that:

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(a) the circumstantial evidence relied upon by the court was insufficient to prove the elements of the charge; and

(b) the single 'injury' was not in any event sufficient to prove the 'element of murder' (as counsel for the appellant phrased it).

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[25] It was also contended that the learned judge had failed to give 'maximum evaluation' to the following matters in evidence, which if assessed properly would have raised or cast doubt on the essential elements related to the appellant's mens rea in committing the alleged crime of murder. They were:

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(a) the admission by the prosecution's witnesses (PW1 and PW2) that they did not personally see the appellant carrying any weapon that night; and

(b) there existed no known animosity or problem between the appellant and the deceased such as to suggest or establish a motive for the appellant's alleged acts.

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[26] In our assessment, the learned judge did not commit any error at the close of the prosecution's case in relying on circumstantial evidence to hold that a prima facie case had been made out and it was the appellant who had inflicted the injury to the neck of the deceased which in turn had resulted in the death of the deceased. The learned judge had directed himself correctly on the law of circumstantial evidence for the basis of his ruling at that stage of the proceedings before the court.

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[27] The principles governing the acceptance of circumstantial evidence have been firmly laid down in numerous cases and we were not persuaded that the learned judge had departed from those principles. When circumstantial evidence is the basis of the prosecution's case, the evidence proved must irresistibly point to one and only one conclusion, namely the guilt of the accused (*Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232). The question to be answered was whether the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime (*Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 where the deceased's body was not even recovered).

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[28] HT Ong FJ in *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25 observed that:

> ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

And in *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36 the Federal Court emphasised that:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and the evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[29] We must state here that on the records there was no other hypothesis suggested or put to the prosecution's witnesses and neither was there any gap in the prosecution's evidence implicating the appellant directly to the incident where the deceased suffered the fatal chop wound. It was not suggested at all to any of the prosecution's witnesses that the deceased was armed with a weapon.

[30] There was the direct evidence of PW1 and PW2 (who was a few metres away from the deceased at the bus stop) that the appellant had suddenly appeared at the scene and executed a strangle-hold on the deceased neck from the back of the deceased. There was no other person in the immediate proximity to the deceased save for the appellant when the deceased shouted out that he had been stabbed.

Others like Kassim or Kada were across the road and away from the deceased.

[31] When withdrawing from the scene of the crime, the appellant was also seen to cover his hand with a blood-soaked towel and further the appellant's shirt was splattered with blood. The appellant did not return to his house but was apprehended elsewhere and subsequently brought home the next day by the police. If the appellant had nothing to do with the event at the crime scene, one would expect him to return to his house.

[32] PW3's evidence was that there was a single chop wound to the neck of the deceased which had severed the vertebral artery. This was the direct cause of death. It was not necessary that there should be a series of injuries or stabbing inflicted to form a conclusion of intention to cause death. Even a single cut or stabbing cleverly executed (as was here) to a crucial organ or part of a body was sufficient to lead to an irresistible inference that serious injury leading to death was intended.

[33] It bears repetition here that according to PW3, the cut inflicted to the right front of the neck of the deceased was of such force that it cut the sternocleidomastid muscle, the right traverse process of the fifth cervical vertebra before rupturing the vertebral artery, causing the massive bleeding.

[34] Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge preferred against him, notwithstanding all other evidence which points to the accused being guilty of the crime charged.

(In *Public Prosecutor v Haniff Basree bin Abdul Rahim* [2004] 3 MLJ 271 it was noted as follows:

> [66] It is not incumbent upon the prosecution to prove the motive of a crime. However if the crime is alleged to have been committed for a particular motive, as in the case here, it is relevant to inquire whether the pattern of the crime fits in the with the alleged motive. Where a case is based on a circumstantial evidence the motive for committing that crime assumes greater importance. It is certainly an important strand of circumstantial evidence to impute the accused's guilt ...

[35] The second ground of appeal taken before us was that the learned judge had failed to fully consider the defence raised by the appellant.

[36] In addressing this ground it must at the outset be highlighted that during the trial, the defence put forward was 'self defence' whilst before us there was a shift in this position, in that the defence was more made out as injury inflicted by the appellant during a 'sudden fight'.

[37] Be that as it may, the learned judge after analysing the evidence in defence stated as follows in His Lordship's judgment:

> I find that the version put forward by the OKT that it was the deceased who had attacked him with a sharp object as an afterthought. *This line of defence was never put by the defence during the prosecution's case.* Questions were never put that the deceased was holding a sharp object at that material time when he attacked the OKT.

In *Megat Halim Megat Omar v PP* [2008] MLJU 647; [2009] 1 CLJ 154, the Court of Appeal held:

> Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defense as an afterthought, or a recent invention as happened in this case.

Furthermore, in *Wong Swee Chin v PP* [1981] 1 MLJ 212; [1980] 1 LNS 138 puts this principle in these now famous words:

> There is a general rule that a failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of a witness's testimony.

> In our adversarial system, that principle is applicable in both civil and criminal trials. (Emphasis added.)

[38] It was not shown to us from the notes of evidence that the learned judge was in error to have made the above findings. Neither was it pointed out to us by counsel for the appellant that the defence of 'sudden fight' had in fact been raised at the trial stage either, or more importantly, put to the prosecution's material witnesses PW1 and PW2, to lend credibility to such a claim by the appellant.

[39] We were baffled as to what was the so-called 'defence' that the appellant now contends the learned judge had 'mistreated' by rejecting the same. Irrespective of whether it was sudden fight or self defence, they were bare statements from the appellant. There was no shred of evidence or any corroboration as to such alleged incident even remotely in this case.

DW2's (his wife) evidence was of no help either to the appellant as it did not attest to what actually transpired at the bus stop between the deceased and the appellant.

[40] The Federal Court, no doubt, in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 has observed that:

> ... However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond reasonable doubt.
>
> At this stage, we would interpolate to remark — though we are disgressing somewhat from the point concerning the onus of proof — that the judge went so far to hold 'that the defence by its failure so to put such questions to the prosecution witnesses ought not to be allowed to raise such issues at the defence stage'. In this, he was clearly wrong, since it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon ...

[41] In the case before us, it must however be noted that there was a difference. The defence was not stopped from raising the defence (at the defence stage of the trial) on account that such defence was not put to the prosecution's witnesses as was cautioned in the *Alcontra*'s decision. The learned judge in the instant trial had proceeded to consider the same notwithstanding and held that on a balance of probabilities, the defence (the appellant) had failed to rebut the prosecution's case. We say that there was nothing to show that this was done by the learned judge without proper evaluation of the only piece of evidence, namely the statement by the appellant on oath.

[42] The third ground of appeal was that the learned judge was wrong in holding that as a fact that there was no defensive wound suffered by the accused when on the records, PW8 (a police officer), had testified to the following effect:

> Q During your investigation did the OKT inform you that he sustained injury on his hand.
>
> A Ya, ada. Dan saya sendiri ada melihat kecederaan yang dialami oleh OKT di tangannya yang mana OKT juga telah dihantar ke hospital untuk mendapat rawatan.

It was suggested that this was another instance of improper 'treatment' of the defence by the learned judge.

[43] It should be noted however that the learned judge's statement was to the effect that as a fact he found there was no defensive wound suffered by the appellant. We take the statement to mean that on evidence led before the court, His Lordship was not satisfied that a defensive wound as claimed, had been inflicted on the appellant's body.

[44] It was, in our view, incumbent upon defence always to have pursued to obtain such relevant medical evidence, (as adverted to by the PW8) and to have it adduced in court to establish that the wounds suffered by the Appellant were indeed in the nature of 'defensive wound'. This had not been done despite such avenue being open and within the powers of the defence to do so at the trial, if that was the case.

[45] It was our view that in any event, there was no material misdirection by the learned judge on this score given that the overwhelming and unrebutted evidence in this case directly implicated the appellant to the fatal injury suffered by the deceased.

[46] Finally, it was contended for the appellant too that the learned judge had not at the close of trial applied the right test or properly appreciated that the defence had raised a reasonable doubt over the prosecution's case.

[47] We found this final point taken in appeal to be totally devoid of any merit. The learned judge had clearly warned himself — 'The accused need only to show on a balance of probabilities to rebut the prosecution's case'. After considering the defence, the learned judge went on to state that '… on a balance of probabilities the accused has failed to cast doubts on the prosecution case. … I find that the prosecution have proved beyond reasonable doubt the charge against the accused …'.

[48] We did not find that there was any misdirection on the part of the learned judge in approaching the defence of self defence or sudden fight in that manner. The burden on the accused in raising such a defence was to prove it on a balance of probabilities. Upon his failure to do so, the prosecution had indeed proved its case beyond reasonable doubt. (Sections 180 and 182A of the Criminal Procedure Code).

[49] We therefore found that there were no merits in the appeal. In our unanimous view the conviction was safe. We accordingly dismissed the appeal and affirmed the conviction and the sentence imposed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum